THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2008-0897

APPEAL OF STONYFIELD FARM, INC.
H & L INSTRUMENTS, LLC, AND GREAT AMERICAN DINING, INC.
UNDER RSA 541:6 and RSA 365:21
FROM ORDER OF PUBLIC UTILITIES COMMISSION
(Supreme Court Rule 10)

ASSENTED-TO MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE*

TransCanada Hydro Northeast, Inc. ("TransCanada"), by its attorneys, Orr & Reno, P.A., moves this Court for leave to appear as *amicus curiae* in the above-captioned appeal. In support of this Motion, TransCanada states as follows:

1. TransCanada is a generator of hydroelectric power, and was deemed by the Public Utilities Commission ("the Commission") to have a sufficient interest in this matter, specifically, the potential impact on TransCanada's "ability to compete in the electricity marketplace in New Hampshire," to request rehearing of the Commission's Order No. 24,898. This appeal is from the Commission's Order No. 24,914, denying the Motions for Rehearing, including the Motion for Reconsideration and Rehearing filed by TransCanada.

2. TransCanada seeks leave to appear as *amicus curiae* before this Court as this appeal raises important issues, including, specifically, the procedural fairness in the investigation initiated by the Commission and the Commission's interpretation of statutes impacting the

competitive retail market for electric generation in New Hampshire and the effect on rates paid by New Hampshire consumers.

3. The issues specifically raised in TransCanada's *amicus* brief were presented to the Commission and properly preserved by TransCanada's Motion for Reconsideration and Rehearing reproduced in the Addendum to its Brief.

4. Counsel for Appellants and for PSNH assent to the relief sought by this Motion.

5. An original and 8 copies of TransCanada's Brief is filed herewith, subject to the granting of this Motion.

6. TransCanada requests, pursuant to Supreme Court Rule 30(4), five minutes for oral argument. In the event that this request for oral argument is granted, Douglas L. Patch will argue before the Court.

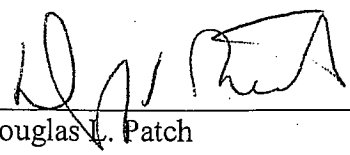
WHEREFORE, TransCanada requests this Honorable Court grant it leave to appear as a*micus curiae* in this matter, and to file its Brief.

Respectfully submitted,

TransCanada Hydro Northeast, Inc.

By Its Attorneys:
ORR & RENO, P.A.

Dated: March 23, 2009

By 

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Motion was mailed on the above date, postage prepaid, to those listed on the attached Service List.

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UNDER RSA 541:6 and RSA 365:21
FROM ORDER OF PUBLIC UTILITIES COMMISSION
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BRIEF OF TRANSCANADA HYDRO NORTHEAST INC.
AMICUS CURIAE

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(Douglas L. Patch will argue, if permitted pursuant to Supreme Court Rule 30)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

New Hampshire Revised Statutes Annotated

Other Authorities

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Commission Erred In Commencing An Investigation Into the Status of PSNH's Efforts to Modify Merrimack Station Without Affording All Interested Parties Notice and An Opportunity to Be Heard Contrary to Part I, Article 12 of The New Hampshire Constitution, RSA 365:19 and RSA 541-A:3?

II. Whether the Commission Erred as a Matter of Law In Refusing to Properly Reconcile RSA 369-B:3-a And RSA 125-O:11, VI To Effectuate the Legislative Intent To Grant To the Commission the Authority to Determine Whether Modifications To Merrimack Station by Public Service Company of New Hampshire Are In the Public Interest?

STATEMENT OF THE CASE

By letter dated August 22, 2008, the New Hampshire Public Utilities Commission ("the Commission") notified Public Service Company of New Hampshire ("PSNH") that it intended, pursuant to its statutory authority under RSA 365:5 and 365:19, to conduct an inquiry into "the status of PSNH's efforts to install scrubber technology; the costs of such technology; and the effect installation would have on energy service rates. . . for PSNH customers." Appendix to Appeal of Stonyfield Farm, Inc., H & L Instruments, LLC, and Great American Dining, Inc. ("Stonyfield Appendix") at 36. PSNH was ordered by the Commission to file by September 12, 2008, a comprehensive status report regarding its project to install a wet flue gas desulphurization system ("scrubber technology") at Merrimack Station in Bow. *Id.* The Commission's inquiry was prompted by the 10Q filed by Northeast Utilities ("NU"), PSNH's parent company, with the Securities and Exchange Commission on August 7, 2008, in which NU estimated PSNH's project cost to be $457 million, representing approximately an 80% increase over the original estimate of $250 million dollars [in 2013 dollars; $197 million in 2005 dollars]. *Id.* In its letter to PSNH, the Commission identified a potential conflict between RSA 125-O:11, VI, enacted in 2006 as part of a Multiple Pollution Reduction Program, and RSA 369-B:3-a, enacted in 2003 as an amendment to RSA 369-B, the comprehensive "Electric Rate Reduction Financing and Commission Action" enacted to accomplish "restructuring," the divestiture of electric generation by New Hampshire electric utilities to "facilitate the competitive market in generation service." RSA 369-B:1, I and II. The Commission directed PSNH to file a memorandum of law on the conflict issue with its status report. *Id.*

PSNH's response to the Commission's Request for Information, dated September 2, 2008, described the project as the "legislatively mandated" installation of scrubber technology at

Merrimack Station, and asserted that PSNH was "diligently pursuing and complying" with the "legal mandates" of RSA 125-0. *Id.* at 38.[1] PSNH unilaterally declared that the information it supplied the Commission would "support the legislature's finding that installation of the scrubber technology at Merrimack Station" is "in the public interest of the citizens of New Hampshire and the customers of the affected sources." *Id.*, quoting RSA 125-O:11, VI. In its September 2, 2008 letter and its Report, PSNH did not acknowledge or address the Commission's concern regarding a potential conflict between the Legislature's statement in RSA 125-O:11 that installation of the scrubber technology was "in the public interest" with the Legislature's directive in RSA 369-B:3-a authorizing PSNH to modify its generation assets only "if the *commission* finds that it is in the public interest of retail customers of PSNH to do so." *Id.* at 37 (emphasis added). Instead, PSNH studiously avoided any reference to RSA 369-B, emphasized the consequences of any delay in the project, and urged the Commission to "act expeditiously to resolve this inquiry so that PSNH may resume the commitment of capital and manpower necessary to install the scrubber technology as mandated by law." *Id.* at 42; *see generally, id.* at 36-53. PSNH's Memorandum of Law similarly characterized RSA 125-O:13, I as an "unmistakable legislative mandate" for PSNH to install scrubber technology at Merrimack Station by July 1, 2013, binding not only on PSNH but also on the Commission. *Appeal of Stonyfield Farm, Inc., H & L Instruments, LLC and Great American Dining, Inc. Under RSA 541:6 and RSA 365:21 From Order of Public Utilities Commission* (Supreme Court Rule 10) ("*Stonyfield Appeal*") at 15; *see also Stonyfield Appeal* at 42 ("The Scrubber Law. . . is clear, straightforward and unambiguous in its mandate").

[1] Because PSNH has the ability under RSA 125-O:17 to request a variance from the mercury emission reduction requirements for a number of reasons, including "economic feasibility," with the approval of the Commission and the Department of Environmental Services, it is difficult to accept PSNH's characterization of the installation as a "legislative mandate."

By the Commission's letter of August 22, 2008, the Office of the Consumer Advocate was invited, but not directed to file a memorandum of law, which it did. *Stonyfield Appeal* at 16. Neither the appellants nor TransCanada were given any notice or opportunity to be heard on the issue of the Commission's authority to determine whether the modification to Merrimack Station, a "generation asset" of PSNH, was in the "public interest of retail customers of PSNH," as required by RSA 369-B:3-a, or whether the Commission's exercise of authority under RSA 369-B:3-a was foreclosed by a legislative finding of "public interest" in RSA 125-O:11, VI.

On September 19, 2008, the Commission, essentially adopting PSNH's analysis, ruled that:

> as a result of the legislature's mandate that the owner of Merrimack Station install scrubber technology by a date certain, and its finding pursuant to RSA 125-O:11 that such installation of scrubber technology at PSNH's Merrimack Station is in the public interest of the citizens of New Hampshire and the customers of the station, the Commission lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether *this particular modification* is in the public interest.

Stonyfield Appeal at 26 (emphasis added). In so ruling, the Commission concluded that RSA 125-O:11 trumped RSA 369-B:3-a's grant of authority to the Commission whether to approve modifications to PSNH fossil and hydrogenerating plants, and narrowly limited the Commission's authority to review this particular modification "to determining at a later time the prudence of the costs of complying with the requirements of RSA 125-O:11-18 and the manner of recovery for prudent costs." *Id.*

On October 17, 2008 and October 21, 2008, respectively, TransCanada and the appellants filed timely Motions for Reconsideration and Rehearing, and then moved for suspension of the Commission's Order of September 19, 2008. On October 27, 2008, the Commission suspended its Order of September 19, 2008 pending further consideration of the issues raised in the Motions.

The Commission denied the Motions for Rehearing on November 12, 2008 in Order No. 29,914. *Stonyfield Appeal* at 49. In its Order, the Commission acknowledged that TransCanada had standing to seek rehearing as TransCanada "may be affected economically by a significant capital investment in PSNH's Merrimack Station insofar as it has an impact on TransCanada's ability to compete in the electricity marketplace in New Hampshire," an interest different than the interest of appellants (referred to collectively in the Order as "the Commercial Rate Payers"). *Stonyfield Appeal* at 53.[2] The Commission then dismissed TransCanada's statutory and constitutional procedural arguments, determining that since the Commission was faced only with a question of statutory analysis, any due process deficiency was "cured" through the rehearing process. *Stonyfield Appeal* at 53-54. Finally, the Commission declined to reconsider its conclusion in its original Order No. 24,898, and again concluded that the "legislature's public interest finding in RSA 125-O:11 that scrubber technology should be installed at Merrimack Station superseded the Commission's authority under RSA 369-B:3-a to determine whether it is the public interest for PSNH to modify Merrimack Station." *Stonyfield Appeal* at 54. The Commercial Ratepayers timely appealed to this Court pursuant to Supreme Court Rule 10, and the appeal was accepted on January 23, 2009.

TransCanada has moved this Court for leave to participate in this appeal as *amicus curiae* as it, as a competitive generator of electricity, has a substantial interest in the resolution of the procedural and substantive issues involved in this appeal.

[2] The Commission did not consider the Motion for Rehearing filed by Edward M.B. Rolfe ("Rolfe"), a PSNH ratepayer, due to his failure to serve his Motion on other parties. *Stonyfield Appeal* at 53, n. 4 and 54.

SUMMARY OF ARGUMENT

TransCanada owns approximately 567 megawatts of hydroelectric generation capacity, consisting of hydroelectric stations and an associated reservoir and dams located in New Hampshire, Vermont and Massachusetts which it purchased from USGen New England, Inc. in April 2005. TransCanada is a competitor[3] of Public Service Company of New Hampshire ("PSNH"), and objected to the failure of the New Hampshire Public Utilities Commission ("the Commission") to provide TransCanada and other interested parties with notice and an opportunity to be heard with respect to the Commission's proposed investigation into the status of PSNH's efforts to install "scrubber technology" at Merrimack Station in Bow, a fact-specific inquiry, and on the legal issue framed by the Commission concerning its authority to conduct its proposed investigation into the modification of PSNH's generation assets. Although the Commission ultimately determined that TransCanada and other interested parties had sufficient interest in the investigation to confer standing to participate in a matter of significant public interest, the Commission's determination that the rehearing process satisfied its statutory and constitutional obligations was unjust and unreasonable.

The Commission erred, as a matter of law, in concluding that it lacked authority to investigate PSNH's multi-million dollar modification of Merrimack Station under RSA 369-B:3-a , which this Court has recently held constituted "a clear directive by the legislature to the PUC specifically regarding PSNH," on the basis of a legislative "finding" in RSA 125-O:11 that installation of scrubber technology at Merrimack Station was in the "public interest." In abrogating its statutory obligation to independently determine whether modifications to PSNH's generation assets were in the public interest, the Commission disregarded elemental principles of

[3] The wholesale and retail electricity marketing and trading activities in the US Northeast are conducted through TransCanada Power Marketing LTd., an affiliate of TransCanada Hydro Northeast Inc.

statutory construction, as well as the plain language of the statutory provisions which it summarily – and erroneously – refused to reconcile to effectuate the Legislature's intent. The result of the Commission's decision declining to exercise its statutory obligations is that PSNH is afforded unfettered discretion to invest ratepayer's funds in modifications of Merrimack Station. If the Commission order is allowed to stand, this investment will be made without regard to the effect on rates or the impact on competition in the retail market, which was the very basis for the comprehensive restructuring of electric utilities in New Hampshire, intended to be accomplished by the enactment of RSA 369-B, and, prior to RSA 363-B, the enactment of 374-F in 1996.

ARGUMENT

I. The Commission Erred In Commencing an Investigation into the Status of PSNH's Efforts To Modify Merrimack Station Without Affording All Interested Parties Notice and An Opportunity to be Heard Contrary to Part I, Article 12 of the New Hampshire Constitution, RSA 365:19 and RSA 541-A:3.

The Commission, on its own motion, initiated its investigation into the status of PSNH's efforts to install scrubber technology at Merrimack Station pursuant to RSA 365:5 and 365:19, an investigation triggered, according to the Commission, by an 80% increase in the estimated project cost from $250 million to $457 million. This increase was disclosed for the first time in NU's quarterly earnings report filed with the SEC on August 7, 2008.[4] Stonyfield Appendix at 36. The initial scope of the Commission's proposed inquiry was broad, and included, *inter alia*, "the costs of the new scrubber technology and the effect that installation would have on energy service rates" for PSNH's customers. *Id.* The inquiry in DE 08-103, as delineated by the Commission, implicated significant issues of fact and, more important, of the public policy involved in the reconciliation of RSA 369-B, dealing with the comprehensive restructuring of electric utilities within the State[5] to facilitate retail electric competition, and RSA 125-O:11, *et seq.*, dealing specifically with the reduction of mercury emissions as part of the State's Multiple Pollutant Reduction Program.

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[4] At the June 18, 2008 meeting of the Electric Oversight Committee established pursuant to RSA 374-F:5, PSNH reported on the status of mercury reductions at Merrimack Station. Despite the fact that it is required by RSA 125-O:13,IX to provide "updated cost information" to the Committee, at that meeting PSNH did not present any information on costs, nor did it provide any indication that the costs for the installation of the scrubbers had escalated over original estimates. Although the Commission cited the reporting requirement as indicating "the legislative intent to retain for itself duties that it would otherwise expect the Commission to fulfill," clearly the Oversight Committee is not fulfilling that responsibility, and PSNH is not complying with its obligations to the Committee. *See Stonyfield Appeal* at 24.

[5] Restructuring involved the "divestiture of electric generation by New Hampshire electrical utilities to facilitate the competitive market in generation service." RSA 369-B:1, II; *see also* RSA 375-F:1 ("Purpose") and RSA 374-F:3 ("Restructuring Policy Principles"). RSA 374-F-3, VIII, in particular, makes clear that "[i]ncreased competition in the electric industry should be implemented in a manner that supports and furthers the goals of environmental improvement. Over time there should be more equitable treatment of old and new generation sources with regard to air pollution controls and costs." RSA 369-B:3-a dealt specifically with the divestiture by PSNH of its fossil and hydro generation assets, and with any modification or retirement of those assets prior to divestiture.

Although the Commission acknowledged an apparent conflict between RSA 125-O:11, VI and RSA 369-B:3-a with respect to the Commission's authority "relative to the Merrimack Station scrubber project," it did not provide notice or an opportunity to those parties, including TransCanada, "whose rights may be affected," as required by RSA 365:19, despite requests from TransCanada and others that it do so. That the initiation of an investigation into PSNH's efforts to modify Merrimack Station, and the resolution of the issue of the Commission's very authority to review PSNH's project, were matters of significant public interest is evidenced by the Commission's receipt of letters from Senator Theodore L. Gatsas, the New Hampshire Building and Trades Council, and Governor John H. Lynch, urging expeditious review by the Commission, and letters from the Conservation Law Foundation, the Campaign for Ratepayers Rights, the New England Power Generators Association, Inc., and TransCanada, requesting that the matter be docketed for full public participation. *Stonyfield Appeal* at 15. With no input from any party other than PSNH and The Office of the Consumer Advocate,[6] the Commission issued its Order No. 24,898, summarily concluding that the two statutory provisions were irreconcilable, and that RSA 125-O:11, as the "more recent, more specific" statute was intended by the Legislature to divest the Commission of the authority expressly delegated to the Commission by the Legislature in RSA 369-B:3-a to determine whether installation of scrubber technology at PSNH's Merrimack Station is in the public interest of the citizens of New Hampshire. *Stonyfield Appeal* at 22-223. Due process requires more.

The statutory provision pursuant to which the Commission initiated its investigation provides, in pertinent part, that "any party whose rights may be affected shall be afforded a reasonable opportunity to be heard. . . ." RSA 365:19. It was – and is -- TransCanada's position

[6] The Office of the Consumer Advocate contended that the Commission not only had the authority but the statutory duty, under RSA 369-B:3-a and consistent with RSA 125-O:13, to determine whether installation of the scrubber technology was in the public interest. *Stonyfield Appeal* at 16-17.

that the Commission's failure to open the proceeding to all parties "whose rights may be affected" deprived TransCanada of its right to be heard on issues that may have "ramifications to competitors in the marketplace for electricity." TransCanada's Motion for Rehearing at 7, a copy of which is included in the Addendum to this Brief. More specifically, TransCanada was entitled to be heard because "by subjecting ratepayers to the risks of significant and costly plant modifications and the potential for future stranded costs, PSNH gains an unfair advantage over competitive generators whose investors must bear all of the risks associated with plant operations and capital improvements." *Id.*

In its Order addressing the Motions for Rehearing, the Commission expressly found that this interest of TransCanada was sufficient to confer standing, *Stonyfield Appeal* at 53, but did not address the merits of TransCanada's claim that it should have been afforded the opportunity to be heard mandated by RSA 365:19. *Stonyfield Appeal* at 53-54. Regardless of whether the Commission short-circuited its proposed factual investigation by concluding that, as a matter of law, it did not have the authority to conduct it, the scope of the original inquiry clearly contemplated resolution of facts, and thus both RSA 365:19 and due process mandated a meaningful opportunity to be heard. *Society for Protection of New Hampshire Forests v. Site Evaluation Committee*, 115 N.H. 163, 168 (1975). The Commission offered no explanation for the deviation from its long-standing practice of seeking input from all interested parties through the issuance of an order of notice and an open and transparent proceeding in a case implicating significant public policy concerns. The only conclusion that can be drawn is that the Commission has no reasonable explanation for allowing only the Consumer Advocate (who, under RSA 363:28, represents only residential ratepayers) and PSNH, which has repeatedly avoided efforts to divest its generation assets (other than its interest in the Seabrook nuclear

generation facility) and has repeatedly sought the protection of a rate-regulated generation environment to avoid financial exposure to its shareholders to brief and argue the jurisdictional basis for the Commission's very investigation ***into the costs and effect on rates*** of PSNH's proposed modifications. Thus, in this matter of significant public interest there was no party involved in a matter of significant public interest to represent commercial or industrial ratepayers, or other interests, such as competitive generators. The Commission's rationalization that any due process deficiency was cured through the rehearing process ignores both practice and procedure before the Commission. In practice, few orders are modified as a result of motions for rehearing, and once an order is issued, the burden shifts to the party requesting rehearing.

Moreover, the Commission's decision is unlawful and unreasonable because of its failure to commence an adjudicative hearing as required by RSA 541-A:31. The determination whether the Commission has the authority to review PSNH's modification to Merrimack Station clearly involves a "proceeding in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing." RSA 541-A:1. The Commission cited no authority for its conclusion that the motions for rehearing "comprise an adequate opportunity to present legal arguments for our consideration and therefore afford due process." *Stonyfield Appeal* at 54. On rehearing, the Commission simply adopted PSNH's argument that because the preliminary inquiry concerning the scope of the Commission's legal authority "did not disclose facts," no opportunity to be heard was required. *Stonyfield Appeal* at 52. Fundamental fairness and due process require more.

II. The Commission Erred As a Matter of Law In Refusing to Properly Reconcile RSA 369-B:3-a and RSA 125-O:11, VI To Effectuate The Legislative Intent to Grant the Commission the Authority to Determine Whether Modifications to Merrimack Station by Public Service Company of New Hampshire Are in the Public Interest.

The "potential conflict" between RSA 369-B:3-a and RSA 125-O:11, VI identified by the Commission raised a new issue of statutory interpretation, and this Court will undertake the statutory analysis *de novo*:

> To the extent that a dispute raises a new issue of statutory interpretation, we begin our inquiry with the examination of statutory language. *Appeal of Pinetree Power*, 152 N.H. 92, 96 (2005). In matters of statutory interpretation, we are the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole. *In the Matter of Jacobson & Tierney*, 150 N.H. 513, 515 (2004). We ascribe plain and ordinary meanings to the words the legislature used. *Nilsson v. Bierman*, 150 N.H. 393, 395 (2003).

Schiavi v. City of Rochester, 152 N.H. 487, 489 (2005); *Appeal of Town of Bethlehem,* 154 N.H. 314, 319 (2006).

Under RSA 369-B:3-a, the Commission is specifically and unequivocally charged with the regulation of the divestiture and modification of PSNH's generation assets. *Appeal of Pinetree Power, Inc.*, 152 N.H. 92, 95 (2005). RSA 369-B:3-a was construed by this Court to be "a *clear directive* by the legislature to the PUC specifically regarding PSNH," and this Court construed the plain language of RSA 369-B:3-a to impose upon the Commission a duty to analyze "the public interest of its retail customers" where and when PSNH seeks to spend significant amounts of money recoverable in rates, modifications of its generation assets. *Id.* at 96. No exceptions were carved out from RSA 369-B:3-a by the Legislature to insulate "particular modifications" of PSNH assets from review and regulation by the Commission.

Although, as PSNH argued to the Commission, the Legislature did state in RSA 125-O:11, VI that the installation of scrubber technology at Merrimack Station no later than July 1,

2013 was "in the public interest of the citizens of New Hampshire and the customers of the affected sources," the legislative statement that the owner "shall install and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013" is found in Section 1 of RSA 125-O:13 ("Compliance"), and not in Section VI of RSA 125-O-11. *Appendix to the Stonyfield Appeal ("Stonyfield Appendix")* at 9-10. Consistent with RSA 369-B:3-a, compliance with the requirement of RSA 125-O to install scrubber technology is expressly made contingent "upon obtaining all necessary approvals from federal, state, and local regulatory agencies and bodies." RSA 125-O:13, I. Those "federal, state and local regulatory agencies and bodies" from whom "necessary approvals" must be obtained are "encouraged," in Section 13, but not explicitly compelled, to give "due consideration to the general court's finding that the installation and operation of scrubber technology at Merrimack Station is in the public interest." RSA 125-O:13, I. The Commission and the Department of Environmental Services, by the statute itself, are expressly included in those agencies who are "encouraged" but not required to give "due consideration" to the Legislature's findings. *Id.*

"Encouraged" is not ambiguous; its plain meaning is "'to spur on' or 'to stimulate' someone to do something." *Associated/ACC International, Ltd. v. Dupont Flooring Systems Franchise Co., Inc.*, 2002 WL 32332751 (D.Del. 2002) (*citing* Merriam Webster's Collegiate Dictionary at 381) at *2-3 (rejecting argument that "encouraged" meant "directed" or "required"). "The legislature is presumed to know the meaning of words and to have used the words of a statute advisedly." *Guildhall Sand & Gravel, LLC v. Town of Goshen*, 155 N.H. 762, 765 (2007), *citing Pennichuck Corp. v. City of Nashua*, 152 N.H. 729, 735 (2005). The plain meaning of the words used by the Legislature in RSA 125-O:13 is simply inconsistent with the Commission's conclusion that the "finding" in RSA 125-O:11, VI must be given preclusive

effect, foreclosing any review by the Commission under RSA 369-B:3-a, to determine whether modification of generation assets owned by PSNH and the costs associated with such modifications are "in the public interest of its retail customers." *Appeal of Pinetree Power, Inc.*, 152 N.H. 92, 95 (2005). From TransCanada's perspective, it is ironic that PSNH, which aggressively defends the security of the rate regulated status of its generation assets, and the Commission, which has as its duty to regulate rates, both chose to rely on a three-year-old "legislative mandate" which "encouraged" due consideration to a legislative finding to claim that no consideration of a $457 million expenditure by PSNH is required. If the Legislature, in fact, wanted to prohibit the Commission from reviewing the costs of scrubber technology, it knew how to say that. In the absence of a clear prohibition, it is appropriate to read the two statutes in a way that they do not conflict with each other.

The Commission's determination that in enacting RSA 125-O:11, VI, the Legislature "already made an unconditional determination that the scrubber project is in the public interest," and therefore stripped the Commission of the very authority delegated to it by the "clear directive" of RSA 369-B:3-a, is contrary to elemental principles of statutory construction. *Appeal of Public Service Co.*, 141 N.H. 13, 17 (1996) (Commission's interpretation of RSA 374:26 would contradict intent of the Legislature, as expressed by the plain language of the statute, by depriving Commission of statutory authority to grant franchises for the public good). Where statutory provisions can be reasonably reconciled, they must be harmonized to effectuate the legislative intent of the statutory scheme. *Appeal for Campaign for Ratepayers Rights*, 142 N.H. 629, 631 (1998), *citing Petition of Public Service Co. of N.H.*, 130 N.H. 265, 282 (1988) ("When interpreting two statutes that deal with similar subject matter, we will construe them so they do not contradict each other, and so they will lead to reasonable results and effectuate the

legislative purpose of the statute."); *State Employees Association v. New Hampshire Department of Personnel*, ___ N.H. ___ (February 18, 2009) (statutes must be interpreted "not in isolation but in the context of the overall statutory scheme"); *see also, In Re Public Utilities Commission v. Statewide Electrical Utility Restructuring Plan*, 143 N.H. 233, 240 (1998)[7]. The Commission's adoption of PSNH's simplistic argument that if a conflict exists between RSA 125-O:11, VI and RSA 369-B:3-a, which PSNH denies, the "more recent, more specific statute" controls ignores a long-established canon of construction that "the law does not favor repeal by implication if any other reasonable construction may avoid it." *Opinion of the Justices*, 107 N.H. 325, 328 (1996); *Arnold v. City of Manchester*, 119 N.H. 859, 863 (the doctrine of implied repeal is disfavored in this State and will not be found without evidence of convincing force."). Indeed, it must be assumed that "[w]herever the legislature enacts a provision, it has in mind previous statutes relating to the same subject matter. *State Employees Association v. New Hampshire Department of Personnel*, ___ N.H. ___, (February 18, 2009) at 7.

The stated basis for the Commission's initiation of an inquiry under RSA 365:19 was its discovery, through public filings, that the estimated cost of the installation of scrubber technology had shot up from the original estimate of $250 million to a projected $457 million. *Stonyfield Appeal* at 14. The legislative "finding" that the installation of scrubber technology was in the "public interest of the citizens of New Hampshire and the customers of the affected sources," upon which the Commission relies, was presumably predicated on the corollary findings set forth in RSA 125-O:11, including the specific finding that the installation of scrubber technology will not only "reduce mercury emissions significantly," but will do so "with

[7] The Commission specifically found that RSA 369-B:3 and RSA 125-O:11, VI dealt with "the *same* subject matter." *Stonyfield Appeal* at 21.

reasonable costs to consumers." RSA 125-O:11, V.[8] There is no reasonable or lawful basis for concluding that the Legislature, which through RSA 369-B restructured electric utilities to "allow retail competition" and "less costly regulation. . . in the public interest," specifically directing the Commission to review PSNH's modification or retirement of its generation assets, would three years later divest the Commission (and by the Commission's interpretation, any other federal, state or local regulatory body) of the authority to review a half billion dollar modification of a significant generation asset located in the New Hampshire. *See In Re Pinetree Power*, 152 N.H. at 97 (stated purposes of RSA 369-B include "facilitating competition.").

An interpretation of RSA 125-O:11, VI that forecloses any meaningful inquiry into investment of ratepayers' monies by PSNH, a public utility with an authorized a rate of return, for significant modifications to Merrimack Station is not only absurd and illogical, but from TransCanada's perspective, it is unfair and wholly inconsistent with the fundamental principles underlying the comprehensive restructuring of electric utilities in New Hampshire, embodied in RSA 374-F and RSA 369-B. Unlike PSNH, TransCanada must assume the risk of improvident decisions or cost overruns resulting from investments in or capital improvements made to its generating facilities.

To the extent that PSNH is permitted to invest ratepayers' funds in modifications to its generation assets, without review by the very agency directed by RSA 369-B:3-a to determine whether such modification "is in the public interest of retail customers of PSNH to do so and provides for the cost recovery of such modification or retirement," TransCanada, and other generators similarly situated, are unfairly prejudiced by the Commission's unprecedented abrogation of its statutory responsibilities. *See* RSA 363:17-a (Commission is the arbiter

[8] The legislative history of RSA 125-O:11-18 indicates that the $250 million was, based on PSNH's data, "a not to exceed number. *See Stonyfield Appeal* at 6.

between the interests of the customer and the interests of the regulated utilities, and must exercise its statutory powers and duties consistently with that role); *see also, In Re Pinetree Power*, 152 N.H. at 100 (RSA 363:17-a *requires* Commission to balance interests of customers and regulated utilities).

Finally, the Commission's conclusion that it retains only the limited authority under RSA 125-O:18 to determine prudence is unlawful.[9] *Stonyfield Appeal* at 25. There is nothing in RSA 125-O:11 *et seq.* that expressly limits the Commission's authority to a "prudence review," and any implied limitation is textually inconsistent with RSA 125-O:13, I and RSA 369-B:3-a. A "prudence review" is limited in scope, and cannot, even in the Commission's own view, provide a meaningful check on economically unfeasible expenditures on modifications to a generation asset." *Public Service Company of New Hampshire, Petition for Authority to Modify Schiller Station*, 89 N.H. PUC 70, 94 (2004) ("A prudence review, as we understand the concept, involved an after-the-fact review of investment decisions, in light of actual performance, but limited to what was reasonably foreseeable at the time of the decisions.")

[9] RSA 125-O:18 provides, in pertinent part, "[i]f the owner is a regulated utility, the owner shall be allowed to recover all prudent costs of complying with the requirements of this subdivision in a manner approved by the public utility commission."

CONCLUSION

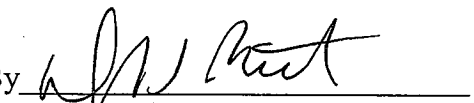
For all of the foregoing reasons, TransCanada respectfully requests this Court to vacate the Commission's Order 24,898 and remand the case to the Commission for further proceedings consistent with this Court's opinion.

Respectfully submitted,

TransCanada Hydro Northeast Inc.

By Its Attorneys:
ORR & RENO, P.A.

Dated: March 23, 2009

By 

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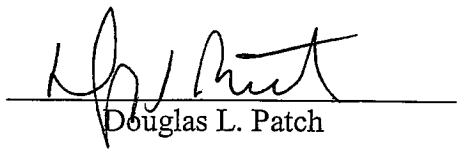
ORAL ARGUMENT

Douglas L. Patch, Esquire, will argue for TransCanada, if permitted pursuant to Supreme Court Rule 30. Mr. Patch respectfully requests five minutes for oral argument.

CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing Brief were mailed this date to those listed in the attached Service List.



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ADDENDUM

State of New Hampshire Before the New Hampshire Public Utilities Commission
Docket No. DE 08-103, Investigation of PSNH's Installation of Scrubber
Technology at Merrimack Station, Motion for Reconsideration and Rehearing
Dated October 17, 2008

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STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Docket No. DE 08-103

INVESTIGATION OF PSNH'S INSTALLATION OF SCRUBBER TECHNOLOGY AT MERRIMACK STATION

Motion for Reconsideration and Rehearing

NOW COMES TransCanada Hydro Northeast Inc. ("TransCanada"), by and through its undersigned counsel, and pursuant to N.H. RSA 541:3 and 541:4, respectfully moves the New Hampshire Public Utilities Commission ("Commission") to reconsider and rehear Order No. 24,898 issued in the above-captioned matter on September 19, 2008 ("the Order"). In support of this Motion, TransCanada states as follows:

Background

1. TransCanada owns approximately 567 MW of hydroelectric generation capacity on the Connecticut and Deerfield Rivers, which TransCanada purchased from USGen New England, Inc. in April of 2005, consisting of hydroelectric stations and associated reservoirs and dams located in New Hampshire, Vermont and Massachusetts.

2. On August 22, 2008 the Commission opened an investigation by Secretarial Letter ("the Letter") following a quarterly earnings report filed by Northeast Utilities with the Securities and Exchange Commission on August 7, 2008 that disclosed that the estimated cost of installing a wet flue gas desulphurization system, also referred to as scrubber technology, at Public Service Company of New Hampshire's ("PSNH") Merrimack Station, had increased by approximately 80 percent over the original

estimate.[1] According to the quarterly earnings report, the installation cost had increased from an original estimate of $250 million to $457 million. In the Letter opening the investigation, the Commission directed PSNH to file by September 12, 2008 a "comprehensive status report on its installation plans, a detailed cost estimate for the project, an analysis of the anticipated effect of the project on energy service rates, and an analysis of the anticipated effect of the project on energy service rates if Merrimack Station were not in the mix of fossil and hydro facilities operated in New Hampshire."

3. In the Letter, the Commission noted that there was a potential statutory conflict as to the nature and extent of its authority relative to the scrubber project and directed PSNH to file a memorandum of law on the issue by September 12, 2008 and invited the Office of Consumer Advocate ("OCA") to file a memorandum of law by the same date.

4. On August 25, 2008 PSNH filed a Motion to Waive Rules and to Accelerate Schedule in Docket No. DE 08-103. In its Motion, PSNH urged the Commission to accelerate the schedule, as it noted in the cover letter, "to mitigate the harm that will be caused by delays in the scrubber project"; it also asked the Commission to require the filing of reports and legal memoranda by August 29, 2008. The OCA filed an objection to this Motion on August 25, 2008.

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[1] At the June 18, 2008 meeting of the Electric Oversight Committee established pursuant to RSA 374-F:5, PSNH reported on the status of mercury reductions at Merrimack Station. Despite the fact that it is required by RSA 125-O:13,IX to provide "updated cost information" to the Committee, at that meeting PSNH did not present any information on costs, nor did it provide any indication that the costs for the installation of the scrubbers had escalated over original estimates. Given the "quarterly earnings report" filed with the SEC on August 7, 2008 referenced in the Commission's August 22, 2008 letter, it is illogical to conclude that PSNH did not have information at that point in time about increased costs from the figures it supplied to the Legislature in 2006 that could have and should have been conveyed to this Committee. Clearly the Electric Oversight Committee process is not working in a way that "suggests the Legislature's intent to retain for itself duties that it would otherwise expect the Commission to fulfill". See the Order at p. 11.

5. On September 2, 2008 PSNH filed a response to the Commission's request for information, including a memorandum of law, a project status report, and a response to specific economic inquiries. In its memorandum of law, PSNH argued, among other things, that: "There is absolutely no implication within the Scrubber Law that the mandate to install a scrubber at Merrimack Station as soon as possible can be delayed, conditioned, or eliminated in its entirety, by the Commission." PSNH Legal Memorandum, p. 49. PSNH went on to say that the Legislature found that the installation of scrubber technology is in the public interest of customers of PSNH and that "the General Court has removed from the Commission any authority to reach a contrary finding." Id. p. 56.

6. On September 11, 2008 the Office of Consumer Advocate filed a memorandum of law in which it argued that the Commission has the authority to investigate PSNH's modifications to Merrimack Station and to determine whether the modifications are in the public interest. The OCA pointed out that PSNH can not complete Merrimack Station modifications without PUC financing approval. In its cover letter the OCA urged the Commission, when it "proceeds to the next phase" to "seek the participation and input of all stakeholders."

7. A number of other interested parties, including TransCanada, filed letters with the Commission in this docket. Governor John Lynch submitted a letter dated September 11, 2008 noting that in light of the increase in costs "serious questions must be addressed regarding the basis for such an increase and the impact on ratepayers." He went on to say that he hoped the Commission "is able to complete this review as expeditiously as possible" and said that "[l]engthy delay raises additional concerns".

State Senator Theodore L. Gatsas indicated, in a letter dated September 5, 2008 that he was "deeply concerned about unnecessary delays and the unintended economic impacts" to the town of Bow. He also said that the legislation was clear that the Commission had no authority "to approve scrubber technology". The Campaign for Ratepayers Rights ("CRR") filed a letter dated September 12, 2008 in which it asked the Commission to "publicly notice the above-referenced docket so as to allow for public participation on this important issue." CRR went on to say that "the rights or substantial interests of other parties, including members of the Campaign for Ratepayers Rights, may be affected by this project." The New Hampshire State Building and Construction Trades Council submitted a letter dated September 9, 2008 to urge the Commission to "quickly conclude its investigation" so the project can move forward. In a letter dated September 12, 2008, the Conservation Law Foundation ("CLF") urged the Commission to "publicly notice the docket" and said that CLF's members' rights and interests would be affected by the proceeding and that a "robust review of the issues" would assist the Commission. TransCanada's letter dated September 12, 2008 urged the Commission to provide public notice of the proceeding and offer a full and fair opportunity to all interested parties. TransCanada pointed out that one of the statutes which the Commission cited as its authority for the investigation, RSA 365:19, provides that "any party whose rights may be affected shall be afforded a reasonable opportunity to be heard with reference" to the investigation. On September 17, 2008 the New England Power Generators Association, Inc. submitted a letter requesting the Commission "provide stakeholders with a full and fair opportunity to review the details of PSNH's proposal and provide comments".

8. On September 19 , 2008, without seeking any further input from interested stakeholders, the Commission issued Order No. 24,898 in which it found that "the Commission lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification is in the public interest." The Commission noted that it had the authority to determine the prudence of the costs at a later time.

Legal Standard for Rehearing

9. RSA 541:3 provides that "any party to the action or proceeding before the commission, or any person directly affected thereby" may apply for rehearing. Although TransCanada filed a letter with the Commission in this proceeding asking it to open the proceeding, the Commission did not allow any parties, other than PSNH and the OCA, into the proceeding. TransCanada thus can not claim that it was a party to the proceeding, although it is likely that it would have sought intervention if it had been given the opportunity to do so. Unlike PSNH, which is a public utility with a guaranteed rate of return, TransCanada and other merchant generators in NH have no such assurance that they will be paid for any investments and capital improvements they make to their generating facilities. In other words, unlike PSNH, TransCanada assumes the risk of any poor decisions or costs overruns associated with operating and maintaining its assets. To the extent that PSNH receives unfettered discretion to invest ratepayer dollars in modifications to its generating facilities, it will obtain a distinct advantage over TransCanada and other similarly situated competitive generators, which will impair the competitive generation market and harm companies like TransCanada. Thus, TransCanada is directly affected by the Commission's decision and therefore has

standing to file this motion. See *In re Londonderry Neighborhood Coalition*, 145 N.H. 201, 203 (2000); *New Hampshire Bankers Assn. v. Nelson*, 113 N.H. 127, 129 (1973).

10. RSA 541:4 requires that a rehearing motion "set forth every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:3 authorizes the Commission to grant rehearing upon a showing that good reason exists for such relief. Such a showing may be made "by new evidence that was unavailable at the original hearing, or by identifying specific matters that were either 'overlooked or mistakenly conceived.'" Verizon New Hampshire Wire Center Investigation, DT 05-083, DT 06-012, Order No. 24,629 (June 1, 2006), p. 7 quoting *Dumais v. State*, 118 N.H. 309 (1978).

11. As discussed more fully below, the Order is unreasonable and unlawful because the Commission ignored the due process rights of interested parties by refusing to allow their participation in the question of law that it was "investigating", contrary to the statutes, the longstanding practice of the Commission, and the New Hampshire and United States Constitutions. The Order is also unreasonable and unlawful because it misinterprets the applicable statutes that clearly provide the Commission with not just the authority, but also the duty, to review the costs of this modification to Merrimack Station. Thus, good cause exists for the Commission to rehear and reconsider the Order.

Discussion of Procedural Deficiencies

12. As noted above, the Commission elected to hear only from PSNH and the OCA on this matter.[2] Despite the fact that the statutory authority that it cited for

[2] By limiting comments on the legal issue to PSNH and the OCA, the Commission did not allow the Commission Staff to submit a memorandum on the legal issue. This came despite the fact that the Staff, in prefiled testimony and a response to a data request in Docket No. DE 07-108, the PSNH Least Cost Integrated Resource Planning docket, indicated that it did not interpret RSA 125-O "as mandating

undertaking this investigation very clearly says that "any party whose rights might be affected" must be afforded a reasonable opportunity to be heard, see RSA 365:19, the Commission chose not to hear from anyone other than PSNH and the OCA. Clearly there are many parties whose rights are affected by whether the modifications to Merrimack Station should proceed and at what cost. The environmental implications of operating that facility affect many people in New Hampshire and elsewhere. The rate increases that will result from the costs of this project will affect PSNH ratepayers, and there are ramifications to competitors in the marketplace for electricity that result from any decision that leads to either the retirement of a PSNH generating facility or that allows PSNH to continue to own and operate an electric generating facility. Lastly, by subjecting ratepayers to the risks of significant and costly plant modifications (and the potential for future stranded costs), PSNH gains an unfair advantage over competitive generators whose investors must bear all of the risks associated with plant operations and capital improvements. By not affording other parties whose rights are affected by this proceeding the opportunity to be heard, the Commission violated its statutory and constitutional responsibilities.

13. The longstanding practice of the Commission is to seek and obtain input from interested stakeholders through the issuance of an order of notice and an inclusive, transparent proceeding. Over the years, the Commission has typically handled

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installation regardless of economics." In his prefiled testimony in that docket, Staff Analyst George McCluskey said that "Staff does not believe that the Legislature intended scrubbers be installed if the resulting production cost is expected to exceed the cost of retiring the plant and replacing the lost output with market purchases." Direct Testimony of George R. McCluskey at page 29. Moreover, in response to data request PSNH 1-28, Mr. McCluskey pointed to RSA 125-O:17, which provides PSNH the ability to request a variance from mercury emissions reduction requirements in the event of "an energy supply crisis, a major fuel disruption, an unanticipated or unavoidable disruption in the operations of the affected sources, or technological or economic infeasibility." He went on to say that Staff interpreted this provision to mean that "the circumstances surrounding the scrubber investment could be such that the public interest would be better served by PSNH doing something other than what is envisioned in the legislation."

important matters of this nature by issuing an order of notice that provides an opportunity for all interested parties to request intervention and, if the Commission grants a party that opportunity, to participate in the process of investigating, reviewing and considering all of the issues in a particular docket. This traditionally inclusive process was not employed here. No order of notice was issued and no parties, other than PSNH and the OCA, were allowed to participate. Although the OCA has the power and duty to appear in any proceeding involving rates and the statutory responsibility of representing residential utility customers, RSA 363:28, the OCA does not have the authority or duty to speak for other stakeholders. Residential utility customers are clearly some, but not all, of the parties whose rights will be affected by the Commission's decision. By limiting participation in this matter to PSNH and the OCA, the Commission has excluded many other parties whose rights and interests are affected, and in so doing, has run afoul ofthe due process protections of the New Hampshire and United States Constitutions that entitle interested parties, whose rights, duties, and interests are affected, to a meaningful opportunity to be heard. *Society for Protection of New Hampshire Forests v. Site Evaluation Committee*, 115 N.H. 163, 168 (1957).

14. The Commission's decision is also unlawful and unreasonable for its failure to commence an adjudicative hearing as required by RSA 541-A:31, I at the time that this matter reached the stage at which it was considered a contested case. A "contested case" is a "proceeding in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing." RSA 541-A:1,IV. The provisions of RSA 541-A:31, I require an adjudicative proceeding if the matter reaches a stage at which it is considered contested. Any

adjudicative proceeding must provide an opportunity for "all parties to respond and present evidence and argument on all issues involved." RSA 541-A:31,IV. The determination of whether the Commission has the authority to review the modifications to Merrimack Station is clearly a contested case under the NH Administrative Procedures Act, and as such, the proceeding should have followed the requirements of RSA 541-A.

15. For all of the reasons noted above, the Commission's failure to seek and obtain the comments of interested parties was a procedural defect that violated the rights of those interested parties and was contrary to the law, the longstanding practice of the Commission, and the New Hampshire and United States Constitutions.

Discussion of Statutory Interpretation

16. As the OCA pointed out in its memorandum of law, the Commission has plenary authority over PSNH. By law, the Commission has general supervision over public utilities, RSA 374:3, the authority to conduct investigations of any acts or rates of those utilities, RSA 365:5 and 19, the power and duty to keep informed, RSA 374:4, and utilities must report cost information to the Commission prior to making any additions or improvements, RSA 374:5. Moreover, RSA 378:7 clearly provides the Commission with authority to take ratemaking action against a public utility "upon compliant" and "after a hearing" into whether the practices of the utility affecting its rates are "unjust" or "unreasonable."

17. Under RSA 369-B:3-a the Commission must approve any modifications or retirements of fossil fuel and hydro-electric generating assets. Before this can happen, the Commission must find that it would be in the public interest to do so. The

Commission thus "regulates divestiture and modification of PSNH's generation assets pursuant to RSA 369-B:3-a." *Appeal of Pinetree Power*, 152 N.H. 92, 95 (2005).

18. Although RSA 125-O requires PSNH to install scrubber technology at Merrimack Station to reduce mercury emissions, it also clearly requires PNSH to seek all necessary approvals before proceeding with the scrubber project: "The achievement of this requirement is contingent upon obtaining all necessary permits and approvals from federal, state, and local regulatory agencies and boards." RSA 125-O:13,I. The Commission is clearly one of the state regulatory agencies, if not the primary state agency, involved with any approvals that PSNH must obtain before making modifications to assets that are included in its rate base and paid for by ratepayers.

19. The Commission must look to the plain and ordinary meaning of the words in RSA 125-O:13 when it interprets this statute. *Appeal of Ashland Elec. Dept.*, 141 N.H. 336, 338 (1996). As RSA 125-O,13,I also says: "all regulatory agencies and bodies *are encouraged to give due consideration* to the general court's finding that the installation and operation of scrubber technology at Merrimack Station is in the public interest." [Emphasis added.] It is important to note that the wording of the statute encourages, but does not require that regulatory agencies give "due consideration" to the Legislature's finding that the installation of the scrubbers is in the public interest. Giving "due consideration" to a finding of public interest is far different than being precluded from examining whether the modifications are, or are not, in the public interest. If the Legislature intended to usurp the Commission's ability to rule on the public interest issue, it would have expressly said so. That is not what the Legislature said. The language of the statute cited above is not consistent with the Commission's finding in the Order that

the "Legislature has already made an unconditional determination that the scrubber project is in the public interest." The Order at p.12. If in fact the Legislature made such an unconditional determination, why did it provide for the variances contained in RSA125-O:17, including giving the owner of the facility the ability to seek an alternative reduction by substantiating "economic infeasibility" ? TransCanada submits that when the statute is read as a whole it is clear that it does not support an interpretation that the Commission is precluded from reviewing the modifications and making its own finding of whether the modifications are in the public interest. The Commission could clearly do this while still giving "due consideration" to the Legislature's finding. For these reasons, the Commission's decision is erroneous as a matter of law.

20. Nowhere in RSA 125-O does the Legislature state that the Commission is specifically precluded from performing its traditional statutory duties under RSA 374:3, 365:5, 365:19, 374:4 and 378:7, among others. It is absurd and illogical to conclude that the Legislature intended to upset and subvert a regulatory paradigm within which the Commission has operated for years and that is fundamental to public utility regulation in New Hampshire and every other state. Because "implied repeal of former statutes is a disfavored doctrine in this State", *Board of Selectmen v. Planning Bd.*, 118 N.H. 150, 152-153 (1978), it is erroneous as a matter of law to conclude that RSA 125-O has implicitly repealed the above-cited statutes. Yet, that is essentially the effect of the Order. Accordingly, it must be reconsidered and reheard.

21. The Commission's fundamental duty is to act as "the arbiter between the interests of the customer and the interests of the regulated utilities." RSA 363:17-a. If the Commission is not performing this function in relation to PSNH's multimillion dollar

expenditures, then no other regulatory body is. If the Legislature intended to radically change the relationship between PSNH and the Commission, it could have and should have said so explicitly. RSA 125-O contains no such legislative direction. In fact, as noted above, RSA 125-O contains far different direction to regulatory agencies with regard to a public interest finding.

22. Statutes should be interpreted in light of the Legislature's intent in enacting them and in light of the policy to be advanced. *State v. Polk*, 927 A.2d 514 (2007). It is absurd to believe that the Legislature intended to advance a policy of allowing unfettered and unlimited recovery of expenses for modification of Merrimack Station, or that it was left to PSNH's discretion to determine whether the costs have become economically infeasible.

23. When statutory language is ambiguous, courts examine the statute's overall objective and presume that the Legislature would not pass an act that would lead to an absurd or illogical result. *See Estate of Gordon-Couture v. Brown,* 152 N.H. 265 (2005). Under the interpretation of the statutes the Commission has put forth, there is no limit on the amount of money that PSNH can spend on the modifications to Merrimack Station and no regulatory agency that can limit those expenditures. Clearly this would be an absurd and illogical result and therefore the Commission's interpretation can not stand.

24. "In ascertaining the meaning of any statute it is material to consider the circumstances under which the language is used, its legislative history and the objectives it seeks to attain." *Newell v. Moreau*, 94 N.H. 439, 443 (1947). Here, the Legislature's characterization of the scrubber technology as "in the public interest" was premised upon

the costs of the scrubber technology being "a reasonable cost to ratepayers". See House Science and Technology Committee Majority Report, House Calendar 22, February 17, 2006, page 1280. This basic premise of the costs to ratepayers being reasonable is also reflected in the language of the purpose section, RSA 125-O:11,V: "The installation of scrubber technology will not only reduce mercury emissions significantly but will do so without jeopardizing electric reliability and *with reasonable costs to consumers*." [Emphasis added.] The Legislative history, particularly the hearings before both the House and Senate Committees, is replete with references to the modifications costing $250 million in 2013 dollars ($197 million in 2005 dollars). PSNH representatives said this, as did the Department of Environmental Services ("DES"), and the New Hampshire Clean Power Coalition. DES even went so far as to say: "Based on data shared by PNSH, the total capital cost for this full redesign *will not exceed* $250 million dollars (2013$) or $197 million (2005$)". [Emphasis added.] See Letter from Michael P. Nolin to The Honorable Bob Odell, Chairman NH Senate Energy and Economic Development Committee, dated April 11, 2006. Clearly, given these representations to the Legislature, and the substantial increase from the figures quoted to them, currently at $457 million, these costs have become unreasonable. Thus, to the extent, if any, that the Commission is bound to the Legislature's public interest determination regarding the scrubbers, it is not appropriate to interpret that determination as applying to cost estimates that have dramatically increased from the figures provided since the statute was enacted.

25. Where reasonably possible, two conflicting statutes dealing with the same subject matter should be construed so as not to contradict each other, or consistently with each other in order to lead to reasonable results and effectuate the Legislature's purpose.

Petition of Public Service Co. of N.H., 130 N.H. 265, 282 (1988); *In Re New Hampshire Public Utilities Commission Statewide Electric Utility Restructuring Plan*, 143 N.H. 233, 240 (1998). The only way to reconcile RSA 369-B:3-a with RSA 125-O consistently is for the Commission to determine that it has the authority to review a modification to a generating facility. TransCanada submits that there is more than sufficient support in RSA 125-O for the Commission to determine that it has this authority.

26. Although the Commission indicated in the Order that it does have authority to determine at a later time the prudence of the costs of complying with the requirements of RSA 125-O, the Commission has traditionally viewed a prudence review as being very limited in scope and breadth. "A prudence review, as we understand the concept, involves an after-the-fact review of investment decisions, in light of actual performance, but limited to what was reasonably foreseeable at the time of the decisions." *Public Service Company of New Hampshire, Petition for Authority to Modify Schiller Station*, 89 NH PUC 70, 94 (2004). A prudence review under these circumstances clearly does not protect ratepayers from economically infeasible expenditures on plant modifications and therefore does not constitute a meaningful review.

27. TransCanada agrees with the OCA's position that the Legislature did not intend to preclude the Commission from conducting an "Easton" review of the financing for this project, see *Appeal of Easton*, 125 N.H. 205 (1984), which would involve a public good determination as provided in RSA 369 that includes considerations beyond the terms of the proposed borrowing to pay for the project.

28. The meager legislative history that the Commission cites in the Order at page 10 does not support the interpretation that the Commission gives to RSA 125-O. Just because members of the Senate Finance Committee considered time to be of the essence does not support a determination that the Commission has no authority to make a public interest determination regarding the scrubber expenditures and/or installation. TransCanada in fact believes that the legislative history supports a far different conclusion. There is support in the legislative history for the fact that the Legislature was trying to act fast because it believed that in doing so it would save ratepayers a lot of money. That has clearly not happened. There is nothing in the legislative history that TransCanda could find to support the conclusion which the Commission reached, that the Legislature intended to take away the authority which the Commission has under other laws to review the expenditures for the modifications.

29. TransCanada asserts, for all of the reasons noted above, and for the reasons noted in the OCA's legal memorandum, Staff's testimony in DE 07-103, and the Motion for Rehearing by Certain Commercial Ratepayers, that the Commission's decision is unlawful and unreasonable. TransCanada hereby incorporates by reference the arguments included in the OCA's memorandum on file in this docket, in Staff's testimony in DE 07-103, and in the Motion for Rehearing by Certain Commercial Ratepayers being filed on the same day as TransCanada's motion. TransCanada respectfully requests that the Commission take official notice, pursuant to RSA 541-A:33,V, of the record in Docket No. DE 07-108. TransCanada also notes that the New England Power Generators Association supports this motion.

Conclusion

30. For the reasons stated above, the Order is unlawful and unreasonable both procedurally and substantively. TransCanada respectfully urges the Commission to reconsider and rehear the decision so that it can correct the procedural failures, hear from interested parties, and ultimately apply a lawful and reasonable interpretation of the statutes.

WHEREFORE, TransCanada respectfully requests that the Commission:

A. Convene an adjudicative proceeding as provided in N.H. Admin. Rule Puc 2505.13 and RSA 541-A:31, I on the contested matters raised herein;

B. Take official notice of the record in Docket No. DE 07-108;

C. Provide all parties whose rights may be affected a reasonable opportunity to be heard on all of the issues in this docket;

D. Grant a rehearing of this matter under RSA 541:3; and

E. Grant such further relief as it deems appropriate.

Respectfully submitted,

TRANSCANADA HYDRO NORTHEAST INC.

By their Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was, on this date, sent either by first-class mail, postage prepaid, or by electronic mail to those persons listed on the Service List.

Date: October 17, 2008

Douglas L. Patch

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